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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CUONG HUU NGUYEN, Defendant and Appellant.	D071630 (Super. Ct. No. SCD267778)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Cuong Huu Nguyen of one felony count of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)),[1] and he admitted to two prison priors for the same offense. The trial court sentenced him to five years' imprisonment and imposed a restitution fine of $1,500. On appeal, defendant contends we should reduce his felony conviction to a misdemeanor because he claims Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (Proposition 47), reclassified section 10851 as a form of petty theft when the value of the stolen vehicle does not exceed $950, and because the People failed to prove that the value of the vehicle he took exceeded this threshold. He further contends the trial court abused its discretion in denying him a "split sentence,"[2] and in imposing a restitution fine of $1,500. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with one count of unlawfully taking or driving a vehicle. (§ 10851, subd. (a).) It was further alleged he had suffered two prior convictions resulting in prison commitments. (Pen. Code, §§ 667.5, subd. (b), 668.)

A. *Prosecution Case*

On the night of July 9, 2016, Francisco S. parked his 1994 Toyota Camry on the street in front of his house. When he got up at about 4:30 the next morning to get ready for work, he heard the sound of a car starting, looked out the window, and saw the

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1 All undesignated statutory references are to the Vehicle Code.

2 "A split sentence is a hybrid sentence in which a trial court suspends execution of a portion of the term and releases the defendant into the community under the mandatory supervision of the county probation department." (*People v. Camp* (2015) 233 Cal.App.4th 461, 464, fn. 1.)

taillights of his car as an unidentified person drove it away. The keys to the car were inside Francisco's house, and he had not given anyone permission to take it. He gathered his vehicle registration documents and called 911 within about five minutes.

Within minutes of police dispatch announcing Francisco's report, responding patrol officers saw defendant drive by in Francisco's car. They initiated a traffic stop and arrested defendant without incident. In the ignition, police found a key attached to a keychain that held several "shaved" keys. Defendant stipulated he "knew/knows what a shaved or altered key is, and it can be used . . . to operate a vehicle for which it is not initially created."

B. *Defense Case*

Defendant testified that on the day before his arrest, he was smoking methamphetamine at his mother's home with a friend named "Oscar" who lived two blocks away. Defendant had known Oscar for a few years, but told police he didn't know Oscar's last name, address, or phone number. When defendant asked Oscar if he could borrow a car, Oscar offered his mother's, but said defendant would have to wait until she returned from work. After Oscar left defendant's home in the mid-afternoon, defendant checked three or four times "all through the night" to see if Oscar's mother had returned. Oscar eventually told defendant the car was available for no more than "like an hour or two." Oscar gave defendant the keys, described his mother's car, and pointed to where it was parked. Defendant used the keys to drive off in the car that turned out to be Francisco's. He testified he was only borrowing the car and did not know it was stolen.

On cross-examination, defendant admitted he suffered felony theft-related convictions in 2007, 2008, and 2009, and one misdemeanor theft-related conviction in 2015.

C. *Verdict and Sentence*

The jury deliberated for about 90 minutes before returning a guilty verdict. In a bifurcated proceeding, defendant admitted the prison prior allegations.

The trial court sentenced defendant to custody in county jail for five years, and imposed a restitution fine in the amount of $1,500.

II. DISCUSSION

A. *Section 10851 as Petty Theft*

A violation of section 10851 can be either *theft*-based (i.e., intending to *permanently* deprive the owner of possession) or *driving*-based (i.e., intending to only *temporarily* deprive the owner of possession). (*People v. Garza* (2005) 35 Cal.4th 866, 871 (*Garza*).) Citing one branch of a split in authorities, defendant contends the new definition of misdemeanor petty theft (with its $950 threshold) adopted by Proposition 47 applies to theft-based (but not driving-based) violations of section 10851.[3] He asserts that because his violation was theft-based, the $950 petty theft threshold applies and his conviction should be reduced to a misdemeanor because the People did not prove Francisco's car was worth more than $950. We disagree. Defendant has not established the factual predicate of his legal challenge—that his violation was theft-based, rather than

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3 The issue is pending before the California Supreme Court. (*People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793.)

driving-based. Even if he had established this predicate, we would follow the line of cases finding Proposition 47's expanded definition of petty theft inapplicable to section 10851. Accordingly, we affirm defendant's felony conviction.

1. *Relevant Legal Principles*

Section 10851, subdivision (a) provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ." A violation of section 10851, subdivision (a) can be charged as either a felony or a misdemeanor.

The California Supreme Court has explained that a violation of section 10851 *can*—but does *not necessarily*—constitute a theft offense. (*Garza, supra*, 35 Cal.4th at p. 871.) "A person can violate section 10851[, subdivision] (a) 'either by *taking* a vehicle with the intent to steal it or by *driving* it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' " (*Id.* at p. 876, italics added.) Unlawfully *taking* a vehicle with the intent to *permanently* deprive the owner of possession constitutes a theft offense. (*Id*. at p. 871.) However, neither the unlawful *driving* of a vehicle with the intent only to *temporarily* deprive the owner of possession, nor the mere driving of a stolen vehicle after a theft is complete, constitutes a theft offense. (*Ibid.*; see *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1286 (*Van Orden*), review granted June 14, 2017, S241574.)

"The voters approved Proposition 47 at the November 4, 2014 General Election, and it became effective the next day." (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Before the enactment of Proposition 47, Penal Code section 487 generally defined "[g]rand theft" as the theft of property worth more than $950, or the theft of certain types of property regardless of their value (e.g., automobiles and firearms). (*Id.*, subds. (a), (d)(1)-(2).) Penal Code section 488 defined "petty theft" as theft that is not grand theft. (*Ibid.* ["Theft in other cases is petty theft."].)

Proposition 47 expanded the definition of petty theft by adding section 490.2 to the Penal Code, which provides: "Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the . . . property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (*Id.*, subd. (a).)

2. *Analysis*

Defendant acknowledges that the central premise of his legal challenge—that the new definition of petty theft adopted by Proposition 47 applies to his conviction for violating section 10851—has merit only if his section 10851 violation was theft-based

(rather than driving-based). Defendant has not met his burden of establishing this factual predicate.

Defendant was the only witness who testified about his intent in driving Francisco's car. He said he only *borrowed* the car for a few hours—that is, *temporarily*—and believed it belonged to Oscar's mother. Defendant's testimony that he did not intend to take the car *permanently* negates the specific intent required for a theft-based violation of section 10851. (*Garza, supra*, 35 Cal.4th at p. 871.) Alternatively, if defendant merely drove the car knowing Oscar had already stolen it, his posttheft driving likewise would not constitute a theft-based violation of section 10851. (*Ibid*.) Thus, defendant's own trial testimony negates his new argument on appeal that his conviction was theft-based.[4]

Nothing else in the record persuades us otherwise. The prosecutor did not expressly pursue a theft theory at trial. Rather, he emphasized during closing argument that the jury could convict defendant if "he intended to deprive the owner of possession for *any period of time*." (Italics added.) Similarly, the relevant jury instruction (CALCRIM No. 1820) stated the jury could find defendant guilty if he "took *or* drove someone else's vehicle" intending to deprive the owner of possession "for any period of time." (Italics added.) Finally, the verdict form did not ask the jury to decide between a theft-based theory or a driving-based theory.

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4 Without explanation, defendant "concedes that this issue was neither presented to the trial court nor considered by the parties." Had defendant raised the issue at trial, the parties could have more directly addressed the issues of defendant's intent and the value of Francisco's car.

Defendant's heavy reliance on *Van Orden, supra*, 9 Cal.App.5th 1277 is misplaced because there, unlike here, it was beyond dispute that the defendant's section 10851 violation was theft-based. There, after the defendant and his girlfriend argued, he stole her car, drove it into a reservoir, and left it there; police later found the car "with all of its windows broken, tires flat, and rims bent." (*Van Orden*, at p. 1284.) Evidence of such a clear intent to permanently deprive the owner of possession of the car is lacking here.

Because defendant has not established the underlying factual predicate of his legal challenge, we affirm his felony conviction on that basis.

Even if defendant had established the underlying factual predicate of his legal challenge, we would affirm his felony conviction on the basis of the line of cases holding that the definition of misdemeanor petty theft adopted via Proposition 47 does not apply to section 10851. (See, e.g., *People v. Page, supra*, 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Sauceda* (2016) 3 Cal.App.5th 635, review granted Nov. 30, 2016, S237975; *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 29, 2016, S235041.)

B. *Split Sentence*

Defendant contends the trial court abused its discretion when it sentenced him to serve a full custody term, rather than a split sentence. We disagree.

1. *Relevant Legal Principles*

When, as here, a defendant is sentenced under Penal Code section 1170, subdivision (h)(1) or (2), the sentencing court "shall" impose a split sentence "[u]nless the

court finds that, in the interests of justice, it is not appropriate in a particular case." (*Id.*, subd. (h)(5)(A).)

The California Rules of Court[5] enumerate the following factors courts "may" consider when determining whether to impose a split sentence:

> "(1) Consideration of the balance of custody exposure available after imposition of presentence custody credits;
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> "(2) The defendant's present status on probation, mandatory supervision, postrelease community supervision, or parole;
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> "(3) Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody; and
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> "(4) Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody." (Rule 4.415(b)(1)-(4).)

Ultimately, "the court's determination must be based on factors that are specific to a particular case or defendant." (Rule 4.415(b).) If the court denies a split sentence, "the court must state the reasons for the denial on the record." (*Id.*, subd. (d).)

We review a court's denial of a split sentence for an abuse of discretion. (*People v. Catalan* (2014) 228 Cal.App.4th 173, 178.)

2. *Background*

The probation department submitted a presentence report recommending the trial court deny probation and sentence defendant to a five-year split sentence consisting of three years in custody followed by two years of mandatory supervision. The probation

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5 All subsequent rule references are to the California Rules of Court.

officer explained he concluded a split sentence was appropriate because he had "reviewed the criteria outlined in . . . Rule 4.415(b) and found none that particularly apply." The report also set forth defendant's lengthy history of drug and auto-theft offenses, and noted his "past performance on probation has been poor"—including the fact he was on probation in five separate cases when he committed the instant offense.

At the sentencing hearing, defendant argued for a four-year split sentence with a "2-2 split." The prosecutor submitted on the probation department's recommendation regarding a split sentence, but emphasized defendant's extensive history of auto-theft offenses. The court and the prosecutor collectively determined the probation report revealed defendant had six prior auto-theft convictions.

The court sentenced defendant to five years in local custody, giving the following explanation for its denial of a split sentence:

> "Okay. Look, I'll be honest with you. I don't see a split doing any good. I really don't see a split doing any good. I looked at this many different ways to see, well, where's the lenience? Where's the compassion, etc. I'm just seeing auto theft and dope, auto theft and dope. . . . I can understand that because of his extensive record. All right. I can't find anything."

Defendant did not object to this explanation.

3. *Analysis*

The trial court did not abuse its discretion by denying defendant a split sentence. The rules expressly enumerate a defendant's "status on probation" and "past performance on supervision" as factors the sentencing court may consider in denying a split sentence. (Rule 4.415(b)(2), (4).) The probation report, which the court and counsel discussed at

the sentencing hearing, indicated defendant was on probation in five separate cases when he committed the instant offense, and that his "past performance on probation has been poor."

The rules also state that "enumeration . . . of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made," provided the court states the additional reasons on the record. (Rules 4.408(a), 4.415(b) [enumerating factors "the court *may* consider . . . ."], italics added.) The trial court stated on the record that it concluded a split sentence wouldn't "do[] any good" in light of defendant's history and cycle of drug and theft convictions, which the probation report documents. The court's explanation makes clear the court's determination was "based on factors that are specific to [this] particular . . . defendant." (Rule 4.415(b).)

Based on defendant's probation status at the time of his offense, his history of poor performance under supervision, and his extensive history and cycle of drug and auto-theft convictions, the trial court did not abuse its discretion in denying defendant a split sentence. (See rules 4.415(b)(2), (4), 4.408(a).)

Defendant contends the trial court did not adequately explain the basis for its decision denying a split sentence. However, defendant did not raise this with the trial court and, consequently, has forfeited the challenge on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353 ["defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention"].) We are not persuaded by defendant's assertion that his trial counsel's failure to raise the issue below constitutes ineffective

assistance of counsel. To establish ineffective assistance of counsel, defendant must show his counsel's performance was both deficient and prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) Assuming without deciding defendant's trial counsel performed deficiently, we find the deficiency caused no prejudice in light of the fact the rules expressly recognize defendant's probation status and past performance under supervision justified denial of a split sentence. (Rule 4.415(b)(2), (4).)

C. *Restitution*

Defendant contends the trial court abused its discretion in imposing a restitution fine of $1,500, claiming the amount is unsupported by the record. We disagree.

At the time of defendant's offense, Penal Code section 1202.4, subdivision (b) required the court to order that defendant pay a restitution fine between $300 and $10,000, unless the court found "compelling and extraordinary reasons for not doing so and state[d] those reasons on the record." (Former Pen. Code, § 1202.4, subd. (b), (1).)[6] If the court intended to impose a fine in excess of the $300 minimum, former Penal Code section 1202.4, subdivision (d) identified factors the court was required to consider, such as "the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime." However, the statute did not require

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6 Penal Code section 1202.4 has since been amended in ways immaterial to our analysis.

the court to make "[e]xpress findings . . . as to the factors bearing on the amount of the fine." (*Ibid*.)

Alternatively, former Penal Code section 1202.4, subdivision (b)(2) expressly authorized the court to impose a felony restitution fine based on a formula: "the court may determine the amount of the fine as the product of the minimum fine . . . multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

Applying the statutory formula here yields a restitution fine in the amount imposed by the trial court. That is, the $1,500 fine imposed is the product of the minimum fine ($300) multiplied by the number of years of imprisonment defendant was ordered to serve (5) multiplied by the number of felony counts of which he was convicted (1). We find no abuse of discretion in the trial court's imposition of a fine in the amount expressly authorized by statute.[7]

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[7] Because the amount of the restitution fine is so clearly authorized by statute, we do not address the Attorney General's contention that defendant forfeited his challenge to the amount of the fine by failing to object on that basis in the trial court.

III. DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.